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Supreme Court, U.S.
FILED
APR 16 2004
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No. 03-1047

IN THE

# Supreme Court of the United States

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BRENDA ADAIR and JOEY ADAIR,
*Petitioners*,

v.

THE ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS, and ANN PAYNE, as its Director, RAYMOND A. CLENNEY, STEPHEN C. WALKLEY, and JAMES A. LITTLETON,
*Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## PETITION FOR REHEARING

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers, when said intermediate Court has granted qualified immunity protection to state officials who, acting under state law, have deprived a daughter of rights because of said daughter's relationship with her own natural mother?

2. Whether this Court needs to re-examine its decision not to grant the Petition for Writ of Certiorari in order to review the protected relationship between a daughter and her mother.

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IN THE

# Supreme Court of the United States

No. 03-1047

BRENDA ADAIR and JOEY ADAIR,
*Petitioners*,

v.

THE ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS, and ANN PAYNE, as its Director, RAYMOND A. CLENNEY, STEPHEN C. WALKLEY, and JAMES A. LITTLETON,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR REHEARING

This Court denied the Petition for Writ of Certiorari on March 22, 2004. This Petition for Rehearing is presented under this Court's Rule 44(2). The Petitioners hereby submit other substantial grounds not previously submitted to this Court. The Petitioners specifically submit that the case of *Hope v. Pelzer*, 536 U.S. 730 (2002) is controlling authority in the instant case and that the unpublished opinion in *Spring v. Shelton State Community College*, 71 Fed.Appx. 822 (Table), 2003 WL 21431408 (11th Cir.(Ala.)),is submitted as persuasive authority, and a copy of the opinion is included for this Court's review. (Appendix D, p. 9a)

## ARGUMENT

It is close to incomprehensible to these Plaintiffs to imagine that, while these public officials should know that they could not, consistent with the constitution, deny benefits to a person because of his or her association with another human being, they did not have reason to believe that such prohibition extended to the mother-daughter relationship. It is submitted that, if *any* associational relationships whatsoever are recognized as being constitutionally protected, this special and closely-knit one should clearly be known to fall within that protection. To the extent that the Eleventh Circuit decision holds that these officials could not have known that their action in encroaching upon that relationship was unconstitutional, then the Plaintiffs hope that this Court will again examine its tacit approval of that disturbing decision.

The jury in this case concluded that Joey Adair's kinship with her natural mother was "a substantially motivating factor in ADECA's decision not to rehire her."[1]

The Eleventh Circuit decision held that Plaintiff Joey Adair had failed to overcome the qualified immunity defense and rejected the argument that "the supervisory defendants' refusal to rehire Joey Adair because of the litigiousness of her mother so obviously violated the First Amendment on its face that any reasonable state official would have known it at the time." (Appendix A, p. 7a). That holding is highly suspect. The Court of Appeals was correct that Plaintiff's counsel had conceded to the district court that there is no materially simi-

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[1] This conclusive finding makes it difficult to rationalize the Eleventh Circuit's apparent questioning of that motivational factor. The panel referred to the relationship factor by using the qualifying language "if true", and by "accepting for the purposes of their case that Joey Adair has therefore proven a constitutional violation. . . ." (Appendix A, 6a). In this case, the jury has *conclusively* found that the mother-daughter relationship skewed their decision not to rehire Joey Adair.

lar case on point (regarding a mother/daughter case of freedom of association in the employment context), but counsel clearly did so in his argument to the jury to demonstrate that no specific precedent was needed to notify an official that punishment for family association was prohibited.

The Defendants, in denying Joey Adair's constitutional rights, knew or should have known that they were violating Ms. Adair's First Amendment protections regarding her freedom of association with a member of her own family.

The issue now presented is whether the trial court properly dismissed the individual Defendants Walkley and Littleton based upon their qualified immunity defenses. The fact that the Defendants were motivated by a desire to reject Joey Adair's application for rehire because of her relationship with her mother, Brenda Adair, has been established by the jury.

The doctrine of qualified immunity protects public officials from monetary damages liability when their conduct does not violate "clearly established" law. There are two steps to analyzing a qualified immunity issue. First, the Court must determine if the government official's conduct violated a constitutional right. If a violation of a constitutional right occurred, the Court then must determine whether the right was clearly established. A right is clearly established if it is clear to a reasonable government official that his or her conduct was unlawful in light of the circumstances. 42 U.S.C. §1983; *Saucier v. Katz*, 533 U.S. 194 (2001).

The Petitioners pointed out to this Court in their Petition for Writ of Certiorari on page 15 that:

> One way to show that a law is "clearly established," or that the official had fair warning, is to point to a prior similar case, but that is not the only way. In *United States v. Lanier*, 520 U.S. 259, 270 (1997), this Court rejected the "fundamentally similar" requirements and warned against requiring too "extreme a level of factual

> specificity" in determining the issue of qualified immunity. "General statements of law are not inherently incapable of giving fair and clear warning." See *Lanier*, 520 U.S. at 268.

Upon the submission of the original Petition, the case of *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) was not cited by these Petitioners although it is highly relevant to the issues in this case. The *Hope v. Pelzer* decision was rendered on June 27, 2002, only three days after the trial court had denied the Plaintiff's motion to alter, amend or vacate its original judgment in the instant case. The Eleventh Circuit alluded to *Hope v. Pelzer* in its decision. (See Appendix A, p.5a.) At page 739, this Court in *Hope v. Pelzer* said:

> As we have explained, qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz,* 533 U.S., at 206, 121 S.Ct. 2151. For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell* [v. *Forsyth,* 472 U.S. 511,] 535, n. 12, 105 S.Ct. 2806, 86 L.Ed.2d 411; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

At page 741, this Court in *Hope v. Pelzer* reaffirmed the holding in *Lanier*, and held that:

> Our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier,* we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can pro-

> vide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts. Accordingly, pursuant to *Lanier,* the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.

In the instant case, even though there is no case directly on point involving the mother/daughter relationship and freedom of association in the employment context, the Defendants were obviously on notice that such familial relationships are constitutionally protected in light of *Wilson v. Taylor*, 733 F. 2d 1539 (11th Cir. 1984)(Regarding personal relationships), and other precedent.

In *Hope*, at page 739, this Court observed that "the Court of Appeals required that the facts of previous cases be "'materially similar' to Hope's situation," and held that such a "rigid gloss on the qualified immunity standard, though supported by [Eleventh] Circuit precedent,[2] is not consistent with our cases."

*In Spring v. Shelton State Community College*, 71 Fed.Appx. 822 (Table), 2003 WL 21431408 (11th Cir.(Ala.)), an unpublished opinion herewith being submitted as persuasive authority (Appendix D, pp. 15a, 19a), the Eleventh Circuit addressed *Hope* and held that:

> Subsequent to the grant of summary judgment, the Supreme Court in *Hope v. Pelzer*, 536 U.S. 730, 739 (2002), stated, "This rigid gloss on the qualified immunity standard though supported by Eleventh Circuit precedent is not consistent with our cases." Spring

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[2] This Court identified the errant Eleventh Circuit cases as being *Suissa v. Fulton County*, 74 F3d 266 (11th Cir.1996); *Lassiter v. Alabama A&M Univ. Bd. of Trustees*, 28 F3d 1146 (11th Cir.1994); and *Hill v. Dekalb Regional Youth Detention Center*, 40 F.3d 1176 (11th Cir. 1994).

> contends that had the district court used the appropriate standard for reviewing the claims of qualified immunity, it would not have granted summary judgment. . . . After considering the record and briefs, it is clear the district court utilized an incorrect legal standard in granting summary judgment based on qualified immunity. Therefore, we reverse and remand to the district court to reexamine the issue of qualified immunity if defendants wish to assert it in light of *Hope v. Pelzer*.

The *Spring* decision was rendered on June 13, 2003, about two months before the Eleventh Circuit decided the instant case on August 14, 2003. No individual judge served on both panels. (Appendix A, p. 1a; Appendix D, p. 15a.

While there has not been a prior case in the Eleventh Circuit with exactly the same set of freedom of association facts as the instant case, this Court has said, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has been held unlawful . . ., but it is to say that in the light of pre-existing law, the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Joey Adair submits that in the light of pre-existing law, the Defendants knew or should have known that it was unlawful to refuse to rehire Joey Adair because she was daughter of Brenda Adair. If *any* level of relationship is protected by the First Amendment, officials should certainly know that the mother-daughter relationship was clearly within the ambit of *any* such protection. Even if precedential case law was not persuasive, any "reasonable state official must have known" that you cannot deny a benefit to a person because he or she was the offspring of his or her own mother. (Appendix A, p. 7a).

Finally, there is also concern that public officials and others who must rely upon precedential cases in the conduct of their affairs are left in a state of uncertainty when important decisions that should be guiding their actions are in effect concealed from them in the form of unpublished opinions.

The current pervasive practice in the Eleventh Circuit of withholding publication of important decisions, in cases such as those involved here, only leads to unnecessary and unrealistic confusion. If this court used this case to clarify qualified immunity standards as they relate to familial relationships, a giant step in this field could be taken.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Honorable Court should grant this petition for rehearing and issue its Writ of Certiorari to the United States Court of Appeals requiring it to review its decision, reverse the judgments of the district court, and remand the case to that court for further proceedings.

Respectfully submitted,

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*Attorney for Petitioners*

## CERTIFICATION OF COUNSEL

Counsel herein certifies that this Petition for Rehearing is hereby submitted pursuant to Supreme Court Rule 44(2), in that it is restricted to substantial grounds not previously presented and that the Petition is presented in good faith and not for delay. Specifically, the Eleventh Circuit's unpublished decision of August 14, 2003 in this case (Appendix A, p. 5a) only acknowledged the case of *Hope v. Pelzer*, 536 U.S.730 (2002) which had been decided on June 27, 2002. However, a separate panel of the Eleventh Circuit decided another unpublished opinion in *Spring v. Shelton State Community College*, No. 02-14147, dated June 13, 2003 (Appendix D, p. 15a). Both unpublished decisions dealt with the standard to be applied in assessing the qualified immunity defense.

Respectfully submitted,

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# APPENDICES

**APPENDIX A**

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Aug. 14, 2003]

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No. 02-15750
Non-Argument Calendar

D.C. Docket No. 00-01562-CV-D-N

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BRENDA ADAIR, JOEY ADAIR,
*Plaintiffs-Appellants,*

versus

ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS, STEPHEN C. WALKLEY, et al.,
*Defendants-Appellees.*

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Appeal from the United States District Court
for the Middle District of Alabama

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Before TJOFLAT, BIRCH, and MARCUS, *Circuit Judges.*

PER CURIAM:

Appellants Brenda and Joey Adair appeal from several rulings by the district court in favor of appellees, Alabama Department of Economic and Community Affairs ("ADECA"), Ann Payne as Director of ADECA, and Stephen Walkley, Raymond Clenney, and James Littleton in their individual capacities. Brenda Adair appeals from the district court's order dismissing her claims against the individual defendants, brought pursuant to 42 U.S.C. § 1983, on the ba-

sis of qualified immunity. She also appeals from the district court's order granting judgment as a matter of law to the appellees with respect to her claims brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Joey Adair appeals from the district court's dismissal of her § 1983 claims against Walkley and Littleton on the basis of qualified immunity.

"We review *de novo* a district court's entry of judgment on the pleadings, accepting the facts in the complaint as true and viewing them in the light most favorable to the nonmoving part." *Horsley v. Feldt*, 304 F.3d 1125, 1131 (11th Cir. 2002). We also review the district court's grant of judgment as a matter of law *de novo*, employing the same standard as the district court used and viewing all the evidence in the light most favorable to the nonmoving party. *See Watkins v. Sverdrup Tech., Inc.*, 153 F.3d 1308, 1313 (11th Cir. 1998).

Upon thorough review of the record as well as careful consideration of the parties' briefs, we find no reversible error and affirm.

The facts of this case are straightforward. Brenda Adair, an employee of ADECA, filed an EEOC charge and lawsuit against her employer in 1990, which she then settled in 1991. In 1998, Adair successfully requested a transfer to the Welfare-To-Work ("WTW") department of ADECA's Workforce Development Division ("WDW"). Unfortunately, Adair soon became frustrated with the WTW department because the State of Alabama was not funding the program.

Shortly thereafter, Stephen Walkley became the director of the WDW and began to reorganize the department. He assigned Brenda Adair to the State Planning and Rapid Response Section, one of the sections she had requested, where her new supervisor was Ray Clenney. Soon after the reorganization, Adair requested another transfer because she realized that she was now forced to work with Steve Davis,

one of the people against whom she had filed claims in 1990. To defuse any conflict, Director Walkley sent Adair a memo clarifying that Davis was not her supervisor and she would never have to work under him. Walkley told her that she should notify her actual supervisor, Clenney, if at any time she thought she was being subjected to a hostile work environment.

Beginning in October of 1999, Adair spent most of her time out of the office on sick leave for sinus surgery and herniated disc surgery. On July 27, 2000, she filed a notice of retirement. Soon after retiring, she filed a new EEOC charge. Adair claims that after the reorganization, her performance reviews dropped from 38.53 and higher ("Consistently Exceeds Standards") to 28.3 ("Exceeds Standards"). She also claims that she was denied training, was criticized verbally, and no longer had an employee working under her as before.

Meanwhile, Brenda's daughter Joey Adair, who had previously worked at ADECA, had taken a temporary leave of absence and now wished to return to ADECA. However, when she applied for re-employment, she was denied because of ADECA's problems with her mother. Brenda and Joey Adair then filed suit in federal district court on November 9, 2000, alleging seven separate claims against ADECA and the individual defendants.[1]

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[1] More specifically, the Adairs brought the following claims (all of which were brought by Brenda Adair except for claim 6, which was brought by Joey Adair): 1) a sex discrimination claim against ADECA pursuant to Title VII; (2) a retaliation claim against ADECA pursuant to Title VII; (3) a gender discrimination claim against ADECA, pursuant to the Equal Pay Act, 29 U.S.C. § 206(d)(1); (4) a claim for injunctive relief against the director of ADECA and for damages against Walkley and Littleton in their individual capacities, for violating her rights under the Equal Protection Clause; (5) a First Amendment retaliation claim against Walkley and Clenney in their individual capacities and for injunctive relief against the director of ADECA; (6) a First Amendment

The district court dismissed Brenda Adair's suit against the individual defendants, finding that they were entitled to qualified immunity. Then, after a three day jury trial, the district court granted judgment as a matter of law in favor of ADECA on Adair's Title VII hostile work environment, constructive discharge, and retaliation claims. In a special interrogatory, the jury returned a verdict in favor of Joey Adair on her remaining claim for injunctive relief against ADECA for its refusal to re-employ her. (The district court had previously granted qualified immunity to Walkley and Littleton on Adair's § 1983 claim). Following the district court's rulings, the Adairs appealed.

Brenda Adair argues on appeal that the district court erroneously held that none of ADECA's decisions constituted "adverse job actions." To prove an adverse employment action under Title VII, an employee must show a serious and material change in the terms, conditions, or privileges of her employment. *See Davis v. Town Lake Park, Fla.*, 245 F.3d 1232, 1238-39 (11th Cir. 2001). Furthermore, the change is to be judged by an objective standard. *See Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1448-49 (11th Cir. 1998). Here, where the most serious change in the conditions of employment alleged by Brenda Adair is that her evaluations declined from "consistently exceeds standards" to "exceeds standards," we agree with the district court that she has failed to show that she suffered from an objectively adverse employment action.

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retaliation claim by Joey Adair for damages against Walkley and Littleton in their individual capacities and for injunctive relief against the director of ADECA; and (7) a retaliation claim for injunctive relief against ADECA under the Family Medical Leave Act, 29 U.S.C. § 2617. (During trial, Brenda Adair withdrew her claims under the Equal Pay Act and Family Medical Leave Act. In addition, Dorothy McKinney was a defendant in the original complaint but was removed from the case at an early stage in the proceedings).

Adair's sole response in her brief is that although the last fifteen years of our jurisprudence may indicate that she has failed to show an adverse employment action, we are actually bound by a prior panel decision in *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986), in which we held that "Title VII gives us no license to decide that any injury, however insignificant, may be regarded as *de minimis*." *Id.* at 1561. However, *Cox* was a disparate treatment case in which a pattern and practice of discrimination had already been shown. The language quoted refers to an entirely distinct legal issue from the minimum showing a plaintiff must make to prevail on a retaliation claim under Title VII. *See Davis* 245 F.3d at 1239. Therefore, Adair is incorrect that the legal issue in this case has already been decided by *Cox*.[2]

Joey Adair appeals the district court's grant of qualified immunity to Walkley and Littleton. We use a two part test to determine whether state officials are entitled to qualified immunity. First, we determine whether the plaintiff's allegations, if true, establish a constitutional violation. *See Hope v. Pelzer*, 536 U.S. 730, 736, 122 S. Ct. 2508, 2513, 153 L.

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[2] In her brief, Adair also devotes two paragraphs to the district court's dismissal of her First Amendment claim. She argues that her claim was valid under the Supreme Court's ruling in *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), which held that a state cannot refuse employment on the basis of an applicant's constitutionally protected free speech. *Id.* at 597, 92 S. Ct. at 2699. However, the district court dismissed Adair's claim because it found that her isolated and vague allegations about "having voiced allegations about the misuse of federal funds" "having filed [an] EEOC charge" and made "other protected utterances" were plainly insufficient to support a claim that the individual defendants knowingly retaliated against her for her protected exercise of public speech. We agree. *Perry* provides a legal framework for a First Amendment violation claim, but Adair must first plead a concrete set of facts to support it. *See generally GJR Inves. v. County of Escambia*, 132 F.3d 1359, 1367-68 (11th Cir. 1998) (establishing a "heightened" pleading requirement for litigants attempting to overcome a qualified immunity defense).

Ed. 2d 666 (2002). Second, if the plaintiff's version of the facts establish a constitutional violation, we determine whether the law was clearly established at the time. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001).

We therefore begin by determining whether the refusal to hire Joey Adair because of her relationship to her mother, if true, violates Joey Adair's constitutional rights. The Supreme Court has repeatedly held that a state may not deny employment to a person on a basis that infringes on her constitutionally protected interests, particularly freedom of association. *See, e.g., Perry*, 408 U.S. at 597, 92 S. Ct. at 2697. We have noted that "[t]he courts have strongly held that freedom of association is no longer tied merely to an advancing of political beliefs." *Wilson v. Taylor*, 733 F.2d 1539, 1543 (11th Cir. 1984).

In *Wilson*, a police officer had been terminated from the Winter Park, Florida police department for dating the daughter of an organized crime figure in Winter Park. We found that "[t]he concept of freedom of association has grown to include more than associations which are for the purpose of advancing shared beliefs." *Id.* As such, the relationship between the police officer and the crime figure's daughter was protected by the First Amendment, whose protections, we held, extended to "purely social and personal associations." *Id.* at 1544.

Assuming that the relationship between Brenda and Joey Adair is equally worthy of protection, and even accepting for the purposes of this case that Joey Adair has therefore proven a constitutional violation, we nevertheless conclude that Adair plainly fails the second prong of qualified immunity analysis—showing that the right was clearly established. In making this determination, we look to whether state officials were given "fair warning" that their conduct was unconstitutional. *See Hope*, 536 U.S. at 739-40, 122 S.

Ct. at 2515. We have held that a state official will be found to have had fair warning under two circumstances: (1) where a materially similar case has already determined that the conduct was illegal; or (2) where the conduct was so egregious that any reasonable state official must have known it was unconstitutional. *See Lee v. Ferraro*, 284 F.3d 1188, 1198-99 (11th Cir. 2002); *Rowe v. City of Ft. Lauderdale*, 279 F.3d 1271, 1280 n.10 (11th Cir. 2002). Adair's counsel conceded to the district court that there is no materially similar case on point. Furthermore, we do not think that the supervisory defendants' refusal to rehire Joey Adair because of the litigiousness of her mother so obviously violated the First Amendment on its face that any reasonable state official would have known it at the time. Accordingly, we affirm the district court's grant of qualified immunity to Walkley and Littleton with respect to Joey Adair's First Amendment claims.

AFFIRMED.[3]

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[3] Appellant's motion to stay the decision on appeal pending a decision in *Bylsma, et. al., v. Walkley, et. al.*, 01-16102, is DENIED as moot.

**APPENDIX B**

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543-0001

[Filed March 22, 2004]

William K. Suter
Clerk of the Court
(202) 479-3011

Mr. Alvin T. Prestwood
350 Adams Avenue
Post Office Box 1910
Montgomery, AL 36102-1910

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No. 03-1047

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Re: Brenda Adair and Joey Adair
v. Alabama Department of Economic and Community Affairs, *et al.*

Dear Mr. Prestwood:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
WILLIAM K. SUTER, Clerk

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

[Filed Dec. 30, 2003]

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Civil Action Number 00-C-1316-W

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DR. TED D. SPRING,

*Plaintiff*,

VS.

DR. TOM E. UMPHREY,

*Defendant*.

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QUALIFIED IMMUNITY MEMORANDUM
OPINION ON REMAND

Plaintiff Dr. Ted S. Spring brought this action in 2000, alleging that be was subjected to retaliation and ultimately discharged in violation of is free speech rights under the First Amendment to the United States Constitution. The Defendant asserts that the case is barred by the doctrine of qualified immunity, which shields state actors from liability from constitutionally impermissible conduct if such conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818; 102 S. Ct. 2727 (1982). On remand from the Eleventh Circuit Court of Appeals, this opinion addresses that defense to liability.

I.

Spring worked as Vice-President of Shelton State Community College in Tuscaloosa, Alabama from 1992 until he was discharged in 1999 by the President of that institution,

Dr. Tom E. Umphrey. In his capacity as Vice-President, Spring was in charge of the day-to-day operations of Shelton State.

Several years into his tenure, Spring discovered academic fraud (e.g,, credits given for courses not taken), scholarship fraud (e.g., scholarships awarded to children of the President who were ineligible for such scholarships) and what he considered to be additional fraudulent, illegal, and unethical conduct by Umphrey and other Shelton State officials, Spring also became aware that Umphrey knew that Spring's name had been forged on three memoranda authorizing the questionable transfer of funds which were the subject of a federal grand jury investigation.

When Spring questioned Umphrey about the misconduct, Umphrey's response was to remove many of Spring's responsibilities and to transfer him from Shelton State's main campus to a phoneless office without air-conditioning on a satellite campus.

In 1995, Spring testified before the federal grand jury investigating Shelton State and Umphrey.

In October 1998, Spring wrote to Fred Gainous, the Chancellor of PostSecondary Education for the Alabama State Department of Education, and outlined his allegations of fraud and other irregularities by Umphrey and other Shelton State officials. He later met with Gainous and discussed these concerns.

In March 1999, the Southern Association of Colleges and Schools ("SAC") visited Shelton State to conduct an on-site review for the re-accreditation of the college. It was a part of Vice-President Spring's responsibilities to meet with the SAC officials, However, to prevent Spring from meeting with the SAC team, Umphrey directed Spring to perform out-of-town

duties while the SAC was visiting the campus. Nevertheless, Spring met with the SAC team and disclosed the perceived irregularities in the operation of the college.

A few months later, on Umphrey's recommendation, Spring was discharged. Umphrey has stipulated that Spring's communications with Gainous and the SAC team played a substantial role in his decision to discharge Spring.

II.

Based on these largely undisputed facts, this Court in April 2002 found that 1) Spring's speech involved matters of public concern, 2) the interests of Spring, as a citizen, in commenting on these matters of public concern, outweigh the interests of Shelton State, as an employer, in promoting the efficiency of the public services it performs through it employees, and 3) Spring's speech played a substantial role in Umphrey's decision to discharge him.

But relying on *Chesser v. Sparks*, 248 F.3d 1117, 1122-1125 (11th Cir.2000); *Stanley v. City of Dalton*, 219 F.3d 1280, 1294-1298 (11th Cir.2000) and *Dennis v. School Board of Volusia County, Florida*, 218 F.3d 1267 (11th Cir.2000), the Court held that Spring's claims against Umphrey were barred by the doctrine of qualified immunity, since there was no Supreme Court or Eleventh Circuit case clearly establishing the First Amendment right not to be terminated in a "concrete and factually defined context" substantially similar to those in this case. *Lassiter v. Alabama A&M Univ. Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir.1994); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir.1993).

Spring's counsel wisely pursued appeal of this Court's initial dismissal of the case.

While the appeal was pending, the United States Supreme Court decided that the Eleventh Circuit teachings in the qualified immunity context were erroneous. *See Hope v.*

*Pelzer*, 536 U.S. 730, 122; S.Ct. 2508 (2002). The Court reminded the Circuit that for purposes of qualified immunity, even in novel circumstances, officials can still be on notice that their conduct violates established law, as notice does not require that the facts of prior cases be materially or fundamentally similar to the facts in the case at bar. Rather, the pivotal question is whether the state of the law at the time of the challenged action gave fair warning to the state actors that their conduct is unconstitutional. *Id.*, U.S. at 740, 741; S.Ct. at 2516. The Supreme Court found that the Eleventh Circuit's "rigid gloss on the qualified immunity standard, though supported by Circuit precedent, is not consistent with [Supreme Court] Cases." *Id.*, U.S. at 739; S.Ct. at 2515.

In light of *Pelzer*, the Eleventh Circuit has reversed this Court's qualified immunity dismissal, and remanded the case for re-examination of the qualified immunity defense.

This court welcomes that opportunity.

III.

The Court finds and concludes, without considerable difficulty, that when Umphrey made and implemented his decisions to retaliate against Spring in the 1996-1999 period and to discharge him in 1999 because of his exercise of his right to speak on matters of public concern, Umphrey was on fair notice that his conduct violated clearly established First Amendment law.

The earliest case which imparted such notice to the Defendant was the landmark case of *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), which stands for the general proposition that public employees may not be dismissed for speech on matters of public concern if their free speech rights as an employee outweigh the public employer's legitimate interests in promoting the efficiency of the services it provides.

*D'Andrea v. Adams*, 626 F.2d 469 (5th Cir.1980) gave notice to Umphrey that the First Amendment protects a university professor's statements to a legislative budget subcommittee concerning perceived improprieties in the use of the university's funds, even if the statements are inaccurate. Like Umphrey, the defendant in *D'Andrea* was the president of an Alabama state university.

*Kurtz v. Vickery*, 855 F.2d 723 (11th Cir.1988), another case involving an Alabama state university, gave notice to Umphrey that the First Amendment protects a university professor's criticisms of the university president and the university's expenditure of funds.

The case of *Martinez v. City of Opa-Locka, Florida*, 971 F.2d 708 (11th Cir.1992), gave fair warning to Umphrey not only that the First Amendment protects a public employee from discharge in retaliation for testimony that the city's bid procedures had been violated by the City Manager, but it also warned him that the doctrine of qualified immunity does not shield such conduct. *Id.*, at 713.

All the other relevant authorities gave fair notice to Umphrey that the First Amendment protects Spring's utterances to the Chancellor of PostSecondary Education and the SAC. *See, Little v. City of North Miami*, 805 F.2d 962 (11th Cir.1986); *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891 (1987); *Bryson v. City of Waycross*, 888 F.2d 1562 (11th Cir.1989); *Oladeinde v. City Birmingham*, 963 F.2d 1481, 1486-87 (11th Cir.1992); *Belyeu v. Coosa County Bd. of Ed.*, 998 F.2d 925 (11th Cir.1993); *Beckwith v. City of Daytona Beach, Florida*, 58 F.3d 1554, 1563 (11th Cir.1995) ("We hold that state employees retain a federal cause of action under the First Amendment when they allege that government employment decisions were taken in an attempt to chill expression protected by the First Amendment"); *Fikes v. City of Daphne*, 79 F.3d 1079, 1083 (11th Cir.1996) ("It is

well established that a state may not discharge a public employee in retaliation for public speech").

## Conclusion

In light of the clearly established law on Spring's right of free speech in the circumstances of this case, Umphrey's defense of qualified immunity cannot prevail.

It is therefore DECLARED that the doctrine of qualified immunity does not shield Defendant's First Amendment violation in this case.

Done this 30th day of December, 2003.

/s/ U. W. Clemon
U. W. CLEMON
Chief United States District Judge

**APPENDIX D**

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed June 13, 2003]

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No. 02-14147
Non-Argument Calendar

D.C. Docket No. 00-01316-CV-C-W

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DR. TED D. SPRING,
*Plaintiff-Counter-Defendant-Appellant,*

versus

SHELTON STATE COMMUNITY COLLEGE,
*Defendant-Counter-Claimant-Appellee,*

ALABAMA DEPARTMENT OF POSTSECONDARY EDUCATION, FRED GAINOUS, TOM E. UMPHREY, individually and officially,
*Defendants-Appellees.*

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Appeal from the United States District Court
for the Northern District of Alabama

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Before ANDERSON and BLACK, *Circuit Judges*, and SHAPIRO*, *District Judge*.

PER CURIAM:

Plaintiff, Dr. Ted D Spring, Vice President of Shelton State Community College ("Shelton State"), appeals the district

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* Honorable Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

court's grant of summary judgment, and denial of his motion to reconsider the judgment in favor of defendants, Fred Gainous, Chancellor, and Tom E. Umphrey, President of Shelton State, in their individual capacities, on the ground of qualified immunity.

On July 11, 2000, Dr. Spring filed an amended complaint against Shelton State, the Alabama Department of Post-Secondary Education, Fred Gainous, Chancellor of Post Secondary Education, and Tom Umphrey, President of Shelton State, in both their official and individual capacities. Dr. Spring alleged the defendants retaliated against him in violation of the First Amendment, Equal Protection Clause of the United States Constitution, and 31 U.S.C. § 3730(h) for investigating and speaking out as Vice President regarding illegal, fraudulent, and unethical conduct at Shelton State; he also asserted pendent state law claims.

On July 16, 2001, defendants filed a motion for summary judgment in which they asserted the defense of sovereign immunity because Gainous and the Alabama Department of Post-Secondary Education had no lawful authority to terminate Spring. Defendants also contended plaintiffs First Amendment claim did not involve speech related to a matter of public concern.

The district court granted defendants' motion for summary judgment in favor of Shelton State, Gainous and Umphrey, in their official capacities, and the Alabama Department of Post Secondary Education on the ground of absolute immunity from damages under the Eleventh Amendment. Gainous and Umphrey were also found entitled to qualified immunity from liability in their individual capacities for violation of plaintiff's First Amendment rights under 42 U.S.C. § 1983 although defendants failed to raise the defense in their motion for summary judgment. The district court later denied plaintiff's motion to reconsider.

Dr. Spring timely appeals the district court grant of qualified immunity to Gainous and Umphrey in their individual capacities. He argues qualified immunity was not asserted by the defendants, and that the legal standard used by the district court has been modified by *Hope v. Pelzer*, 536 U.S. 730 (2002).

## I. FACTUAL BACKGROUND

Dr. Spring served as Vice President of Shelton State from September, 1992, until his termination in June 1999. Defendant, Fred Gainous, Chancellor of the Alabama Department of Post Secondary Education, and Tom Umphrey, President of Shelton State, interviewed and hired Dr. Spring.

In the course of his employment, Spring became convinced of illegal, fraudulent and unethical conduct by Umphrey and other Shelton State employees. He also became aware that Umphrey knew Spring's name had been forged on three memoranda authorizing the transfer of funds to a program the subject of a federal Grand Jury investigation.

When Spring questioned Umphrey about the misconduct, Umphrey took no action to stop or correct it but instead took away some of Spring's responsibilities. Spring then met with Gainous to report illegal conduct regarding academic scholarship[1] and credit card fraud, and the retaliation against Spring. Despite Gainous's promise to investigate the allegations and respond, he never contacted Spring or took any corrective action.

Spring contends Umphrey continued to retaliate by taking important duties and responsibilities from him. Spring wrote Gainous again but neither Gainous nor his office responded. Spring was ordered off-campus during the Southern Association of Colleges and Schools ("SACS") accreditation visit,

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[1] It is alleged that President Umphrey's son, Tom Jr., illegally received scholarship funds as did his daughter, Libby.

but he informed SACS of illegal and fraudulent conduct in the Spring of 1999, and the retaliatory conduct by Umphrey intensified.

Spring had never been reprimanded for any substandard performance until he began to complain of illegal, unethical, and fraudulent practices. In June, 1999, defendants terminated Spring on charges of negligence, incompetence, and insubordination.

## II. STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo* and apply the same legal standards used by the district court. The evidence and all factual inferences are viewed in the light most favorable to the party opposing the motion and all reasonable doubts about the facts are resolved in favor of the non-movant. Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Wooden v. Board of Regents of University System of Georgia*, 247 F.3d 1262, 1271 (11th Cir. 2001).

## III. DISCUSSION

Finding Spring's speech related to a matter of public concern, his interest in engaging in the speech outweighed defendants' interest in prohibiting it, the speech played a substantial role in the decision to terminate Spring, and that defendants would not have made the same decision in the absence of the protected speech, the district court concluded that Spring's First Amendment right to free speech had been violated by his termination for voicing concerns about academic fraud, scholarship fraud, and other improprieties at Shelton State. But the district court then found Gainous and Umphrey entitled to qualified immunity because there was no Eleventh Circuit or U.S. Supreme Court case clearly establishing the right not to be terminated in a "correct and

factually defined context" substantially similar to this case (R1-27; R1-28).

Subsequent to the grant of summary judgment, the Supreme Court, in *Hope v. Pelzer*, 536 U.S. 730, 739 (2002), stated, "This rigid gloss on the qualified immunity standard though supported by Eleventh Circuit precedent is not consistent with our cases." Spring contends that had the district court used the appropriate standard for reviewing the claims of qualified immunity, it would not have granted summary judgment. Spring also claims the district court erred by granting summary judgment on the basis of qualified immunity when defendants failed to move for summary judgment or present any argument on this issue below.

After considering the record and briefs, it is clear the district court utilized an incorrect legal standard in granting summary judgment based on qualified immunity. Therefore, we reverse and remand to the district court to reexamine the issue of qualified immunity if defendants wish to assert it in light of *Hope v. Pelzer*. This disposition renders moot whether qualified immunity was previously raised in the district court.

REVERSED and REMANDED.